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POST-DATED CHECKS

The recent appearance of a new edition of Brannan on the *Negotiable Instruments Law* with its helpful discussion of problems arising under but not definitely settled by that law, suggests comment on another field of negotiable instruments which is seldom covered. Ordinarily negotiable instruments are treated as falling into two classes, bills of exchange and notes. Checks are considered as one form of bill of exchange. Post-dated checks, as such, are not considered at all by the Negotiable Instruments Law except in so far as section 12 provides that "the instrument is not invalid for the reason only that it is . . . post-dated." But what effect is to be given the instrument pending its appearance as a fullfledged check is left to be determined.

It is of particular interest to note the differences which may distinguish a bill of exchange from a check. The latter is defined as being "a bill of exchange drawn on a bank and payable on demand,"¹ and that, except as to the time for presentment² and the effect of certi-

¹ N. I. L. sec. 185.

² N. I. L. sec. 186.

fication,³ "the provisions of this act applicable to a bill of exchange payable on demand apply to a check." This does not touch the question of form. Nothing is clearer than that a bill of exchange may be drawn on a bank and payable on demand and still not be a check. In which case the slight differences of form found in practice between the two instruments may become of great importance in determining what effect is to be given to the instrument. What would be an unreasonable time for presentment in one case and thereby discharge the drawer to the extent of the loss,⁴ might discharge the drawer entirely in the case of the other.⁵ As a matter of practice, the difference in wording is usually well understood by all parties and the question seldom comes up. A check carries the words "Pay to" while a demand bill usually has the words "At sight" or "On demand" preceding the order to pay.

But when the instrument is, on a check form, properly dated as of the day of issue, but containing the statement "Pay to A or order Jan. 1," the question is squarely presented. Many courts have held that the intention of the parties that the instrument should be and operate as a check on and after Jan. 1, should control.⁶ To hold the instrument a bill would allow the payee to present at once for acceptance and, on protest for non-acceptance, would allow an immediate action against the maker, which would be entirely contrary to the intention of the parties. The better ruling, however, places the emphasis on form and for the sake of certainty and convenience in business treats such instruments as time bills of exchange.⁷

Where the instrument is wholly in the usual form of a check, except that it is post-dated, it is not to be confused in form with a bill of exchange. It is a check in everything except that it is not payable on demand. Consequently by definition, it is not a "check," nor is it a bill of exchange allowing of presentment and dishonor. It might much better, in legal effect, be compared to a time note made payable at a bank. Both operate as orders on the bank, if presented on the day of payment,⁸ and both, up to that date, represent the maker's unqualified promise to pay.⁹ But the time note must be presented on the date of its maturity in order to charge indorsers,¹⁰ while it is well settled that a post-dated check becomes a check with all its incidents

³ N. I. L. sec. 187-8.

⁴ N. I. L. sec. 186.

⁵ N. I. L. sec. 70.

⁶ *Champion v. Gordon* (1872) 70 Pa. 474; *In re Brown* (1843, C. C. D. Mass.) 2 Story, 502; *Way v. Towle* (1892) 155 Mass. 374, 29 N. E. 506; *Westminster Bank v. Wheaton* (1856) 4 R. I. 30.

⁷ *Harrison v. Nicollet National Bank* (1889) 41 Minn. 488, 43 N. W. 336; *Morrison v. Bailey* (1855) 5 Oh. St. 13; *Mintern v. Fisher* (1854) 4 Calif. 35; *Ivory v. State Bank* (1865) 36 Mo. 475; *Bowen v. Newell* (1853) 8 N. Y. 190.

⁸ N. I. L. sec. 87.

⁹ *Camas Prairie State Bank v. Newman* (1909) 15 Ida. 719, 99 Pac. 833.

¹⁰ N. I. L. sec. 70.

when the due day arrives,¹¹ and thus has an extra period for presentation. It is that period in the interim when the instrument certainly is not a bill of exchange, in the sense that it can be accepted or protested, and when just as certainly it is not a check, not being payable on demand, that is peculiar. The Negotiable Instruments Law provides for no class of instruments intermediate between a check and a bill of exchange. A post-dated check has elements of both, but during the time preceding its date, while it may be said to be a "check in abeyance," it is yet distinctive, and to liken it to either may tend to confuse.

The only way to determine the exact rights, privileges, powers and immunities that may pertain to a post-dated check, to decide just what a post-dated check is, is not to give the instrument the one name or the other, but to look to the decisions on each particular question which may be raised in regard to it. It goes almost without saying that post-dated checks are valid and negotiable. Section 12 of the Negotiable Instruments Law would suffice to settle this, but it is fully backed up by decisions.¹² Early in their existence it was held that they are not drafts payable on demand, but are payable at a future day and therefore require the same stamp tax as any time instrument.¹³ In cases where they have been treated simply as bills of exchange, a distinction would not have been material to the decision.¹⁴ The use of post-dated checks is so well accepted that there is nothing in the fact that it is post-dated to put one on notice.¹⁵ And so negotiation before maturity to a *bona fide* holder for value cuts off all personal defences existing between the maker and his payee.¹⁶ That a post-dated check cannot be "paid" in advance of its date, so as to extinguish *pro tanto* the bank's debt to its depositor, seems reasonable. A refusal on the part of the bank to honor the instrument before its due date, is in no sense a dishonor allowing an immediate action against the maker.¹⁷ The bank can only debit the depositor's account by payments at the time, to the person, and for the amount authorized by him.¹⁸ And where the bank has paid the check before date, it is still liable to the depositor for the amount.¹⁹ Though, like a drawee

¹¹ *Wilson v. McEachern* (1911) 9 Ga. App. 584, 71 S. E. 946; *Mohawk Bank v. Broderick & Powell* (1834, N. Y. Ct. Err.) 13 Wend. 133; *Gough & Herring v. Staats* (1835, N. Y. Sup. Ct.) 13 Wend. 549.

¹² *Frazier v. Travis P. and B. Company* (1881, N. Y. Sup. Ct.) 24 Hun. 281.

¹³ *Allen v. Keeves* (1801, K. B.) 1 East, 435. They have since been held properly stamped as bills payable on demand. *Royal Bank v. Tottenham* [1894] 2 Q. B. 715.

¹⁴ *Cf. Forster v. Mackreth* (1867) 16 L. T. N. S. 23.

¹⁵ *Brewster v. McCardel* (1832, N. Y. Sup. Ct.) 8 Wend. 478.

¹⁶ *Mayer v. Mode* (1878, N. Y.) 14 Hun. 155; *Symonds v. Riley* (1905) 188 Mass. 470, 74 N. E. 926.

¹⁷ *Wilson v. McEachern*, *supra*.

¹⁸ *Cf. Wheeler v. Guild* (1838, Mass.) 20 Pick. 545.

¹⁹ *Godin v. Bank of the Commonwealth* (1856, N. Y. Super. Ct.) 6 Duer, 76.

discounting a bill, it could have held the checks until their date and thus had the same claim against the maker as any endorsee for value.²⁰ In fact, a post-dated check held by the drawee bank for collection has priority of payment, on penalty of the bank being liable to the extent of the shortage, if other paper is paid during the day depleting the funds.²¹ But a change in date accelerating payment is material and the bank cannot thereafter charge its depositor's account though it paid in ignorance of the change.²²

A nice question appears as to the effect of a post-dated check given in payment of a pre-existing debt. If the analogy of the post-dated check to a time note is to prevail, the usual rule would be that such payment should bar suit on the original cause of action until the due date had arrived.²³ On the other hand, ordinary checks given in payment of a debt are, in the absence of agreement to the contrary, held to be a discharge of the indebtedness only when paid.²⁴ The question as to whether they suspend a right of action on the debt until presented for payment does not seem to be considered. Logically, a post-dated check, pending its due date, should suspend the creditor's right of action on the debt.²⁵ Certainly, where the payee has negotiated the instrument to a holder for value without notice the drawer's debt is not subject to garnishment by the payee's creditors until after the date of the check and its dishonor.²⁶

The question of certification of a post-dated check does not arise very often. Usually the maker is out of funds and it is, if only for that reason, ordinarily difficult to secure certification. But where a cashier duly authorized to certify checks acts in fraud, the instrument is enforceable against the bank by a holder in due course.²⁷ The difficulty with a post-dated check bearing a certification across its face of a date earlier than the due date is that it carries notice of lack of authority in the cashier; the presumption being that it was drawn on no funds. Therefore, a subsequent taker cannot recover of the drawee bank.²⁸ And it was so held, even though the holder secured

²⁰ See *Swope v. Ross* (1861) 40 Pa. 186; *Desha Shephard & Co. v. Steward* (1844) 6 Ala. 852.

²¹ *Washington Second National Bank v. Averill* (1894, D. C.) 2 App. Cas. 470.

²² *Crawford v. West Side Bank* (1885) 100 N. Y. 50, 2 N. E. 881.

²³ *Martens-Turner Co. v. Mackintosh* (1897) 17 App. Div. 419, 45 N. Y. Supp. 275.

²⁴ *United States National Bank v. Shupak* (1918) 54 Mont. 542, 172 Pac. 324; *Kinard v. First National Bank* (1906) 125 Ga. 228, 53 S. E. 1018.

²⁵ A very unsatisfactory decision allows an action by the creditor on returning the post-dated check before its due date. *Lockwood Trade Journal v. N. Y. Silicate Book Slate Co.* (1904, Sup. Ct.) 88 N. Y. Supp. 152.

²⁶ *Wilson v. McEachern*, *supra*.

²⁷ *Farmers & Mechanics Bank v. Butchers & Drovers Bank* (1857) 16 N. Y. 125; *Detroit National Bank v. Union Trust Co.* (1906) 145 Mich. 656, 108 N. W. 1092.

²⁸ *Clark National Bank v. Bank of Albion* (1868) 52 N. Y. 593.

the bank president's promise that the check would be met.²⁹ However, if the certification carried no date and the transfer was made by the holder on or after the due date, there would be no actual notice and it would follow the bank would be liable.

But certification at the instance of the maker presents a different problem. It has been held that on such certification the bank must appropriate sufficient funds of the depositor at once to meet the check.³⁰ And in such a case the presumption is that there were funds and a subsequent taker can enforce the check against the drawee bank.³¹ This presumption of regularity should allow a taker before date to stand on the same footing as if he had taken after the due date without notice. But if the transfer is made by the payee before date it is impossible for the indorsee to tell who had it certified. Very probably an indorsee in such case will be held to take at his peril.

Practically, post-dated checks are in wider use and better repute than is usually accredited them. They possess all the advantages of payment by check coupled with a time element. It would seem very unwise for a maker to have his post-dated check certified, however, as he loses control of his deposit and interest and, if the bank were to fail, probably would not be discharged of the debt. But from the maker's standpoint an ordinary post-dated check is better than payment by time bill because it cannot be dishonored and protested with an immediate demand of payment. It should also, as has been shown above, amount to a suspension of the creditor's claim on the original debt. From the taker's standpoint, there is an advantage in that presentment need not be made on the exact day in order to charge the drawer or indorsers. Hence it is submitted that post-dated checks should find fuller recognition and come to fill their particular place of usefulness among the different types of commercial paper.

REVERSED JUDGMENT AS EVIDENCE IN MALICIOUS PROSECUTION

In a suit for malicious prosecution the plaintiff must prove both the termination of the original action brought by the present defendant and a want of probable cause to justify the institution of that action. If the original prosecution resulted in a conviction the plaintiff suing for malicious prosecution would find himself offering in evidence a fact from which an inference might be drawn that there was probable cause, thus fortifying the case of the defendant. The probative force

²⁹ *Swenson Bros. Co. v. Commercial State Bank* (1915) 98 Nebr. 702, 154 N. W. 233.

³⁰ *Smith v. Fields* (1911) 19 Ida. 558, 114 Pac. 668. This court held that the bank became liable immediately on certifying the check and that payment could be demanded at any time on presentment.

³¹ *Merchants & Planters Bank v. First National Bank* (1914) 116 Ark. 1, 170 S. W. 852.